

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

AMEER MCMULLEN, a minor, by and through his parent and guardian, ANGELA JOHNSON,	:	APPEAL NO. C-120528 TRIAL NO. A-1010211
	:	
and	:	JUDGMENT ENTRY.
	:	
ANGELA JOHNSON,	:	
	:	
Plaintiffs-Appellants,	:	
	:	
vs.	:	
	:	
STANLEY H. CARR, M.D., et al.,	:	
	:	
Defendants,	:	
	:	
and	:	
	:	
MERCY HEALTH PARTNERS OF SOUTHWEST OHIO, d.b.a. MERCY HOSPITAL MT. AIRY,	:	
	:	
and	:	
	:	
MERCY HEALTH PARTNERS OF SOUTHWEST OHIO,	:	
	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiffs-appellants Ameer McMullen, a minor, and Angela Johnson (collectively “Johnson”) filed a medical-malpractice complaint against several defendants including defendants-appellees Mercy Health Partners of Southwest

Ohio, d.b.a. Mercy Hospital Mt. Airy, and Mercy Health Partners of Southwest Ohio (collectively “Mercy Hospital”). Johnson sought damages for injuries Ameer had sustained during his birth at Mercy Hospital. The trial court granted summary judgment in favor of Mercy Hospital. Johnson has filed a timely appeal from that judgment. We find no merit in her two assignments of error, and we affirm the trial court’s judgment.

In her first assignment of error, Johnson contends that the trial court erred in granting summary judgment in favor of Mercy Hospital. She argues that issues of fact exist as to whether Mercy Hospital was liable under a theory of agency by estoppel. This assignment of error is not well taken.

After reviewing the record, we find no issues of material fact. Reasonable minds can come to but one conclusion—that Johnson did not look to Mercy Hospital for her medical care, but instead looked to it as the situs where the physician she had personally chosen would treat her. Consequently, she did not establish all of the elements of agency by estoppel. *See Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 628 N.E.2d 46 (1994), syllabus; *Vanderpool v. Univ. Hosp., Inc.*, 1st Dist. No. C-020020, 2002-Ohio-5092, ¶ 13-14; *Wise v. Qualified Emergency Specialists, Inc.*, 1st Dist. No. C-980802, 1999 Ohio App. LEXIS 6025, *14-20 (Dec. 17, 1999). Mercy Hospital was entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment in its favor. *See Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977); *Greene v. Whiteside*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, ¶ 23 (1st Dist.). We overrule Johnson’s first assignment of error.

In her second assignment of error, Johnson contends that the trial court erred in denying her motion for leave to amend her complaint to add new claims against Mercy Hospital. Civ.R. 15(A) provides that after a responsive pleading is served, a party must seek leave to amend a pleading. *Hoover v. Sumlin*, 12 Ohio St.3d 1, 4, 465 N.E.2d 377

(1984), *modified on other grounds, Jim's Steakhouse, Inc. v. Cleveland*, 81 Ohio St.3d 18, 688 N.E.2d 506 (1998); *Lassiter v. Lassiter*, 1st Dist. No. C-010309, 2002-Ohio-3136, ¶ 31. While the rule states that courts should freely give leave to amend when justice so requires, the ultimate decision whether to grant leave lies within the trial court's discretion. *Wilmington Steel Prod., Inc. v. Cleveland*, 60 Ohio St.3d 120, 121-122, 573 N.E.2d 622 (1991); *Lassiter* at ¶ 31; *McConaughy v. Boswell Oil Co.*, 126 Ohio App.3d 820, 830-831, 711 N.E.2d 719 (1st Dist.1998).

Where a plaintiff fails to make a prima facie showing of support for the new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading. *Wilmington Steel Prod.* at 123. Because Johnson's proposed amendments lacked the required factual and legal support, the trial court did not abuse its discretion in denying her motion for leave to amend her complaint. *See id.* at 122; *McConaughy* at 831. We overrule Johnson's second assignment of error, and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DINKELACKER and FISCHER, JJ.

To the clerk:

Enter upon the journal of the court on May 29, 2013

per order of the court _____.
Presiding Judge